UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	)	12-MDL-2323-AB
KEVIN TURNER and SHAWN WOODEN, on behalf of themselves and others similarly situated, Plaintiffs, vs. NATIONAL FOOTBALL LEAGUE and NFL PROPERTIES, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	)	Philadelphia, PA April 16, 2018 2:01 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ANITA B. BRODY
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

I N D E X

(The following was held in open court at 2:01 p.m.)

THE COURT: We're here in the matter of the In re: National Football League Players' Concussion Injury Litigation at 2012-2323. And I recognize now Mr. Birenboim.

MR. BIRENBOIM: Thank you, Your Honor, may it please the Court --

THE COURT: Okay. You're welcome.

MR. BIRENBOIM: -- Bruce Birenboim from Paul, Weiss, Rifkind, Wharton & Garrison for the NFL parties.

Your Honor, as you know, we're here on the NFL's motion to dismiss on preemption grounds.

THE COURT: Yes.

MR. BIRENBOIM: We're dealing with the opt-out cases. These are the cases that opted out of the class settlement.

And as Your Honor noted in approving the settlement, the -- the preemption issue, the opt-outs face a stiff challenge, and we think that that's actually an understatement. We think that these claims are very, very clearly preempted and that despite the mass of material that Your Honor received, the issue is really quite straightforward. The legal test is clear.

The question is whether in considering these claims, the Court needs to construe any of the provisions of the Collective Bargaining Agreements that govern the parties and

whether --

THE COURT: I wouldn't mind going back and forth a minute. Would you agree with that? Are you going to be arguing for the opt-outs?

MS. FLEISHMAN: Yes, Your Honor. And, no, I don't agree with that.

THE COURT: What?

MS. FLEISHMAN: Yes, Your Honor, I am -- I am definitely arguing for the opt-outs, and, no, I don't agree with what --

THE COURT: All right. Okay.

MS. FLEISHMAN: -- Mr. Birenboim said.

THE COURT: This is what I did before, and I'm not doing -- I'll let you go forward and then I'll ask her the same question. Okay.

MR. BIRENBOIM: Okay.

THE COURT: One second. Mr. --

(Off the record, 2:04 p.m. to 2:04 p.m.)

THE COURT: All right. Barnum and Bailey has nothing on me. Go on.

MR. BIRENBOIM: All right. The Supreme Court cases addressing preemption starting with Allis-Chalmers lays out the test, which is, do the claims require the Court to construe provisions of the Collective Bargaining Agreement and are the claims inextricably intertwined with the provisions of

the Collective Bargaining Agreement?

To do that, I think it's best just to go straight to the Collective Bargaining Agreement -- Agreements. There are seven Collective Bargaining Agreements stretching really 50 years, a half century, beginning in 1968 when -- when it was agreed that doctors would be provided on-site at all the games.

From that point forward, the League and the clubs and the players negotiated extensively about workplace health and safety, especially when it came to playing the game, the rules of the game, medical care for the players, advising the players on conditions, advising the players on return to play.

There were provisions that were enacted in the Collective Bargaining Agreement imposing a duty on doctors to disclose to players and advise players on their medical conditions that affect their health. There are provisions that impose duties on doctors to determine when a player returns to the game and when a player should not and what the effect of any injuries would be on that player.

There are provisions that impose duties to provide appropriate medical care and disclosure, a duty to provide a second opinion, second medical opinion if the player wishes, duties imposing certain qualifications on the doctors and trainers that tend to the players, duties that require the doctors to follow all medical guidelines, a creation of an

Accountability in Care Committee that players were involved in to address medical care issues and provide disclosure and information about injuries and medical care, the creation of a Joint Committee on Player Safety and Welfare to address equipment issues and turf issues and things like that.

In short, there was a whole mosaic of provisions that the League and the players and the clubs created in this very, very extensive web of Collective Bargaining provisions that deal with player health and safety. So when the players -- when the players say, the opt-outs say in their brief that the players were left to fend for themselves, nothing could be further from the truth, Your Honor.

This was an extremely sophisticated union that bargained with the clubs and bargained with the NFL over half a century to create an entire system that took care of player health and safety. So this is actually the archetype -- the archetype situation where the players and the League and the clubs took the issue of player health and safety out of the common-law realm and put it into the Collective Bargaining Agreement.

And that's exactly the situation where the Courts say you should defer to the Collective Bargaining Agreement so that the Federal Courts can create a uniform system in Federal common-law.

THE COURT: Okay. Well, that's one issue -- that's

one issue that's -- that is certainly before me, is the -- I assume you're going to take some of the plaintiffs' complaints and have me -- and address their specific claims.

Right now you're addressing the first part of it which is basically the negligence claim, and I certainly understand that. Tell me about your -- tell me about the fraud claim.

MR. BIRENBOIM: Well, the fraud claims and the negligence claims should be treated exactly the same under preemption analysis because in the negligence context, the plaintiff has to prove a duty, you know, Torts 101.

In the fraud context, it's exactly the same. You have to have a duty to disclose. Without a duty, if you don't have a duty to disclose, then not disclosing doesn't breach anything. There can be no fraud. There has to be a duty to disclose in the fraud context in a fraudulent concealment case like these are.

So it's the same question. What exactly are the duties of the NFL in light of this extensive web of Collective Bargaining provisions that deal with health and safety.

And on top of that, there's also the question of reasonable reliance which is also, obviously, an element of fraud. And in order to determine whether a player reasonably relied on, for example, an alleged non-disclosure of some fact by the NFL, you have to look at what the Collective Bargaining

Agreements did in assigning duties to the club and to the doctors.

If the -- if the Collective Bargaining Agreement, as these do -- these agreements -- assigned to the clubs and the doctors the principal requirement and duty to disclose to the players their health and safety issues and to advise the players, there's a question, what is reasonable reliance on what the NFL said? We're not arguing and we don't need to demonstrate what the answer to that question is.

All we need to demonstrate for preemption is that the Court is going to have to look at the Collective Bargaining provisions to make a determination what the duties are of the NFL in light of the duties of the clubs that were negotiated. And this is why in many, many cases that we cite in our brief, Duerson, Maxwell, Stringer, Ballard, Jeffers, Smith, Dent. They go on and on.

All of these Courts have reached the same conclusion, and these are cases that have both fraud claims and negligence claims. There's rarely a case that doesn't have both.

THE COURT: But why don't you tell me -- just differentiate the case of the NHL.

MR. BIRENBOIM: The NHL case --

THE COURT: Have you -- I assume you're familiar with that.

MR. BIRENBOIM: I'm familiar with the NHL case, and if Your Honor reads the NHL case carefully, the bottom line in the NHL case is that the plaintiffs submitted to the Court lots and lots and lots of documents and letters and things like that that were not part of the Collective Bargaining Agreement and were, therefore, in the view of the Court, not properly before the Court on a motion to dismiss. So the Judge deferred -- deferred decision on all of these issues.

And if you read it carefully, and I read it carefully last night again because I suspected Your Honor might ask me about it. If you read it carefully, the Judge does not say --

THE COURT: That's requiring too much of me, but I'll try.

MR. BIRENBOIM: -- the Judge did not say that she finds that there is no duty or that interpreting the --

THE COURT: I know, but she delayed it, and she --

MR. BIRENBOIM: She just delayed it.

THE COURT: Yes, but you -- are you ready to have me delay it?

MR. BIRENBOIM: We're not because in this case we haven't placed before Your Honor anything outside of the Collective Bargaining Agreements. We don't think anything is necessary outside of those agreements. And all these cases we've been talking about, case after case, decides preemption

on basically two legs. What does the complaint say? What are the provisions of the Collective Bargaining Agreement? You don't need anything else.

And in this case, as in all the cases that found preemption in cases like this, we think it's perfectly clear that in order to -- let's take claim one in the -- in the amended complaint. Claim one is, and I'm quoting, "The NFL had a duty to protect the health and safety of the players."

We submit that you cannot possibly answer that question without looking at what duties were imposed on the clubs in connection with the negotiations of these labor contracts, and, therefore, what duties would be imposed on the League given what was imposed on the clubs. You just can't do that without construing the Collective Bargaining Agreement.

So really -- I don't think it's an overstatement to say that -- that this case falls as much in the center of labor law preemption as you can imagine. It's difficult to imagine a Collective Bargaining Agreement that has so many provisions and spends so much time on the issue of player health and safety. And the notion that you could -- could decide the issue of duty or reasonable reliance without construing these provisions we think is -- is impossible.

So we believe that this is really a very straightforward, very clear case. We've cited all the cases that follow us.

THE COURT: The other case -- case I'd like you to explain -- to make sure that I understand your view on the Kline case. It's a Third Circuit case. I bring --

MR. BIRENBOIM: The Kline -- I know the case, Your Honor. That's -- that's the surveillance case.

THE COURT: Yes.

MR. BIRENBOIM: And we don't have any disagreement with the Kline case. I mean, what the Kline -- first of all, the Kline case states the test just as we've stated it, and all the Kline case says is that there's nothing in the Collective Bargaining Agreement that speaks to the issue of whether you can have eavesdropping devices all over.

And in that case, where the claims were violations of the Wiretap Act and the Surveillance Act and things like that, the Court said we don't need to look at anything in the Collective Bargaining Agreement to determine if there's a violation of the Wiretap Act. So we have no problem with the Kline case.

And I think any -- to the extent it's read to say anything more on the law, that's not the case. The Kline case is perfectly consistent with Allis-Chalmers and Lincoln Mills and all of the other Supreme Court cases that have laid out the boundaries of labor law preemption.

What's interesting about the plaintiffs' briefs are -- is if you read them carefully, the cases they rely on tend

to be these Supreme Court cases that just state through abstract principles. They don't really talk about cases that address these issues in the football context, and that's because they all go against them, Your Honor. There aren't any cases really that go their way.

And, second, they have a bunch of pages in their briefs where they go over each provision of the Collective Bargaining Agreement and try and explain why it needn't be construed in this case. Well, I think the defensiveness of that position speaks volumes. The fact that they spend page after page after page trying to convince the Court that the Court needn't look at these provisions actually demonstrates why the Court needs to look at the provisions.

And if you read what they say, their principal arguments in each column, principal arguments why you don't need to consult the Collective Bargaining Agreement, there are two. One, these situations -- these provisions impose duties on the clubs, not the NFL. Well, that -- that position's been rejected in a whole bunch of cases including Duerson and Maxwell which were both against the NFL.

And the second -- and, Your Honor, you have to look at the duties imposed on the clubs to determine what duties reasonably are to be imposed on the NFL since the NFL's duties -- they're not the employer. So they don't have duties of a safe workplace. You have to look at what duties are imposed,

based on what duties were imposed on the clubs.

And the second argument that the plaintiffs make is that all these provisions apply to only active players, not retired players. Well, that position also has been rejected consistently, Maxwell, Ballard, Smith, Atwater, case after case has rejected that because you have to look at the duties that existed when the player played even if the player is now retired.

And on top of that, the Collective Bargaining Agreement does impose certain duties and provides certain benefits in retirement. And so the players have certain rights even as retirees.

The other arguments -- and I don't want to overstay my welcome, Your Honor -- the other arguments that plaintiffs raise in their briefs really don't go anywhere. They talk about the gap year issue. Our position on the gap year point is the same as it is in the Duerson case which is you can't artificially look only at, you know, X numbers of years that a player played and ignore the years before and after when a Collective Bargaining Agreement was in effect.

They talk about this duty to the world that's somehow separate from any duties imposed in the Collective Bargaining Agreements. We think that -- the Stringer case dealt with that and basically said even if there is some duty in the abstract to act reasonably toward the world, once you

have Collective Bargaining Agreements, you have to look at how the Collective Bargaining Agreement provisions have -- have tempered those duties.

THE COURT: Well, there's really been no -- has there been any football case that has ever -- that has ever -- has held that there was no preemption? Do you know of any football case that has held that there was -- I mean, every one of the cases that I'm familiar with and one of the reasons that I approved the settlement was because everyone who had looked at it had said that there was preemption.

MR. BIRENBOIM: There -- there are -- there's at least one case involving throwing the flag into a player's eye --

THE COURT: I'm not --

MR. BIRENBOIM: -- where I believe there was no preemption.

THE COURT: Okay.

MR. BIRENBOIM: It didn't deal with health and safety by the clubs. It dealt with a referee that threw -- and in their -- so there are a couple of cases that deal with some issues about training facilities which really isn't addressed in the CBAs. But, no, there are no cases that I'm aware of -- unless my colleagues correct me -- no cases I'm aware of that deal with concussions and health and safety that -- that did not find preemption.

THE COURT: Okay. Why don't you conclude so I can hear from the other side? I have been through this before, and I have to tell you that I have certain points of view on it. I'm not sure that -- I mean, you know, you certainly argue very well. I can't tell you that it's going to --

MR. BIRENBOIM: Well, the only other point I'll make, Your Honor, is that plaintiffs have this collateral estoppel argument which we think is frankly frivolous and I won't address it unless Your Honor has some questions.

And I would just close by saying again that we think that labor law preemption is a central tenet of labor law in this country, and what the Supreme Court has said is that where the parties sit down and decide to make workplace health and safety a subject of Collective Bargaining and it comes out of the State tort system into the labor law system, and that's exactly what's happened here.

THE COURT: Suppose I go one way on one issue and one way on the other? In other words, on the -- on some of the claims, I say that's preempted and others not, what -- what's your position?

MR. BIRENBOIM: Well, you have supplemental jurisdiction over -- once you have a claim, you have supplemental jurisdiction over State Law claims even if they have no Federal -- original Federal jurisdiction so you keep everything.

THE COURT: Okay. Thank you.

MR. BIRENBOIM: Thank you.

THE COURT: I appreciate that. All right.

MS. FLEISHMAN: Good afternoon. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. FLEISHMAN: I'm going to start -- Mr. Birenboim just spoke specifically about the -- what the standard was here, and I think that he's misapprehended the standard. Because Justice Stevens --

THE COURT: Put your -- put your -- that's right. Thank you.

MS. FLEISHMAN: Is that better?

THE COURT: Better, yes.

MS. FLEISHMAN: Yes. Justice Stevens wrote in Lingle that, "We hold that an application of State Law is preempted by 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a Collective Bargaining Agreement."

An interpretation is quite different than having to look or refer to or consider written documents to rely upon.

The other standard for determining whether or not Section 301, preemption, applies is the standard whether or not the claim itself is inextricably intertwined with -- with the claim that -- that the plaintiffs are making. In this

case, we submit to Your Honor that the way this -- this particular complaint was pled, we have not struck that chord at any place in the complaint.

Mr. Birenboim said there's no cases that -- in which 301 preemption has applied to -- to football when -- when safety or health is at issue, but, in fact, Your Honor, there are several. In the Cleveland Browns case, it was a case involving a staph infection at the -- at the facility, the training facility, and the Court denied preemption.

At the Brown vs. NFL case, the referee threw a stick -- I can't recall what kind of stick it is, but he -- a flag -- at the -- at the football player. Again, the Court found that that was not preempted -- whether that was not preempted. That went back to State Court.

There's another Green vs. NFL case in which there was a bounty -- the bounty case in which there was a bounty to be paid. And when that case came before the District Court and the NFL argued that Section 301 applied, again, the Court refused to apply that.

In Oliver vs. Riddell, the same issue also came up. And, in fact, in Stringer, the issue comes up in the most interesting way, because Stringer is the case when the player is practicing out in the heat and he passes out and dies, and his wife brings an action against the NFL. And the issue -- and there were two sets of issues in that case.

So issue one is, they -- the plaintiffs there actually pled all of the language specifically from the Collective Bargaining Agreement about safety and welfare on the -- on the field and they actually talked about him as an active player and what he should have done on the field.

But then the Court said -- then looked at the second part of the case -- and unquestionably the first part of the case, because it was directly a quote from the CBA, it was directly about what the NFL had said to the clubs, what they should do, that in that case it was no question that it was preempted.

However, interestingly, plaintiff also made a claim about the equipment, about selection of equipment and about -- which was exactly what we have made -- those claims we've made here, and they were claimed against the NFL and NFL Properties which we have done here.

And in that instance, the Court said that the CBA imposes no duty on either the NFL or NFL Properties to ensure that the equipment used by NFL players adequately protects from risk of injury or illness. They say any such duty if it exists clearly has its source in common-law. And then the Court specifically -- on Count 4, the Court specifically said that is not preempted under Section 301.

Here we have two defendants. Defendant number one is NFL Properties. NFL Properties has nothing to do with the

CBA at all and is not referenced and nothing about it is referenced in the CBA because NFL Properties acquires equipment, acquires training equipment, sometimes in the past it sold the films as marketing, that kind of thing. It has absolutely nothing to do with -- anything to do with the fields or anything that happens on the field. And there's no question -- that's an easy one. There's no question any claims against NFL Properties are not -- clearly not preempted under Section 301.

NFL we say is also -- the claims against the NFL are also not preempted. And the reason for that is that we've alleged there was a negligence in the -- specifically -- there was fraud and negligence in the -- in what they said about the safety of football, in showing the films and showing the films that monetize football. They encouraged all these children over decades and decades and decades to play football. This is a great He-man sport.

That -- this is not possibly protected by Section 301. They deceived the community. They deceived the public and they deceived the players. So the players themselves, of course, wanted to continue to go out and play harder and harder since this is this He-man sport. That's number one.

Number two -- I'm not going to address all the claims in our complaint because it would take too long. But we have an issue about the research that was done and the Mild

Traumatic Brain Injury Committee that was set up in 1994. That's not protected under any CBA -- any CBA. There's no Collective Bargaining Agreement that has anything to do with that. This is about research. Frankly, it was about fraudulent research, but it's about research. And that is absolutely not protected by Section 301.

I can keep talking about this for a long time, but -- and I want to just address one other point. In the NFL case, I think Judge -- I think Judge Nelson's opinion is very instructive to -- to what we are faced with here. Because in Judge Nelson's case, she had a case --

THE COURT: That's the NHL case?

MS. FLEISHMAN: Yes, that's the NHL case. In Justice Nelson's case -- exactly. In the NHL case, she said there are all these issues, all these allegations. You know, I can't -- I don't know if they're true or not. I can't make an assessment.

So I -- and she said, it was premature. I think this motion to dismiss is unquestionably premature. We should go and do the discovery we need to do in order to -- and then to figure out what is or is not properly within Section 301 LMRA.

THE COURT: Okay. Thank you.

MS. FLEISHMAN: Thank you, Your Honor.

THE COURT: All right. Have you reserved any time?

Do you with to respond?

MR. BIRENBOIM: May I respond, Your Honor?

THE COURT: Of course.

MR. BIRENBOIM: Just very, very quickly. The two cases about staph infection and the referee flag are the two cases that I cited to Your Honor, and there are no other cases involving health and safety issues for football that don't find preemption. The cases uniformly find preemption.

On NFL Properties, there's basically nothing in the entire complaint about NFL Properties other than a single allegation that relates to equipment. The Joint Committee on Player Health and Safety which began in the '80s and has continued on specifically addresses equipment issues. So I think the Court does need to look at those provisions to determine whether there is any conceivable duty on the part of NFL Properties to the public.

And, finally, Your Honor, despite the NHL case, there are -- there is case after case after case after case after case that we put in our brief where the Courts decide preemption based on looking at the Collective Bargaining Agreement and looking at the claims. That's all that's required by the Supreme Court.

And it completely undermines and turns the entire concept of preemption on its head to say that you should go through a big long discovery process and litigate the case in

Federal Court only then to find that the issues should be subject to the grievance procedure which is the point of Federal preemption in the first place. So that's why we think Courts routinely make a complete preemption finding based on just the Collective Bargaining Agreement and the complaint at the very outset.

Thank you, Your Honor.

THE COURT: Okay.

MS. FLEISHMAN: If Your Honor pleases, Brad Sohn is going to address the Court on the -- on one issue which is the equitable estoppel issue and also on some issues that he raised in his Johnson brief (phonetic).

THE COURT: All right. You have five minutes. I don't know if I allocated the time to him, but I'm going to -- I'll listen to you, Mr. Sohn.

MR. SOHN: Thank you, Your Honor. I appreciate it.

This is an issue --

THE COURT: Yes, I did, I did -- I did allocate. My apology.

MR. SOHN: No, not at all.

THE COURT: Okay.

MR. SOHN: Good afternoon again, may it please the Court. I'm going to try and frame this preemption argument a little bit, because I think to some degree what Mr. Birenboim said is not accurate. I agree wholeheartedly with what Ms.

Fleishman said obviously.

But what's particularly important when looking at 301 preemption is the procedural posture in which the actual issue is teed up. And defendants are asking the Court to do essentially one of two things. They're either making a 12(b)(6) argument in which they're saying that the four corners of the complaint trigger 301 preemption, and as the case law says -- I won't belabor it, but it's cited in the papers, the Pension Guaranty case and the Burlington Coat Factory case.

They make it clear that if we're going under 12(b)(6), traveling under that procedural rule to argue preemption, then if the Court's going to even consider a CBA, the CBA needs to be expressly put into the complaint. In other words, we saw the 20 or so paragraphs about ambulance and right to medical care or something like that -- right to medical records -- one would literally have to have included that express language within the complaint in order for the Court to consider it under 12(b)(6).

And I haven't frankly really heard them make that argument. I tend to think what they're doing is making a jurisdictional argument under 12(b)(1) in one of two ways. Either what they're saying is that -- excuse me for one second -- either they're saying that the -- based on the essence of the claims, not taking them as they appear but the essence of

the claims, requires the Court to apply complete preemption, or they're saying that the -- again, the face of the complaint, once we go into the CBA.

But the problem with 12(b)(1), and the case law says this as well. In fact, the case the defendants cite, the Oddo vs. Bimbo Bakeries case, talks about the fact that if the rule travels -- if they're traveling under 12(b)(1), plaintiffs by right get to make an evidentiary rebuttal to their motion. So -- and Ms. Fleishman alluded to it. What sorts of evidentiary issues are we talking about? We don't believe the estoppel issue is frivolous.

There is clearly arbitral precedent where there was full and final opportunity to appeal, and the NFL prevailed where they said tort law is just not a remedy under the Collective Bargaining grievance procedures whatsoever. So certainly that would need factual development.

Another key thing, and it's alluded to on the face of the complaint, but it's certainly something that warrants some discovery, if nothing else, to authenticate the documents, in making these claims through the MTBI committee, the MTBI committee's published words said we are expressly claiming our independence. We have no ability to be regulated by team doctors. We have no ability to be regulated by the clubs, and we're providing this information so that the football world can be safe. That I'm paraphrasing, but it's

pretty faithful.

And so those would definitely be issues that we would want to be able to make an evidentiary rebuttal on as we are allowed to do respectfully by right based on Third Circuit law. So I think -- the first thing we need to do is clarify exactly which way the defendants are trying to accomplish this, and then if they are trying to accomplish it through 12(b)(1), we should at least have that ability to respond.

And that's all I have unless Your Honor has questions.

THE COURT: No, I'm -- I'll hear the -- you have a chance to respond to that particular issue. But this is a very -- this is very close. I don't want you to think I don't think it is. It is very close. So I -- it's the second time I'm hearing it and I'm as perplexed as I was the first time, but that's okay. Go ahead, go ahead.

MR. BIRENBOIM: We obviously don't think it's that close --

THE COURT: I know that.

MR. BIRENBOIM: -- but you're the Judge.

THE COURT: Well, unfortunately, those are kind of the realities.

MR. BIRENBOIM: But, briefly, Your Honor, we cite a bunch of cases on page 32 of our reply brief for the proposition that you do not need discovery to decide a

preemption motion and that's what consistently happens in the Federal Courts in case after case. You can decide it on the Bargaining Agreements and the complaint --

THE COURT: I have no question that you can do it. Whether it's appropriate in this case is a different story, but I -- I think that that's absolutely accurate.

MR. BIRENBOIM: And just finally on this collateral estoppel point, the Court doesn't need anything other than the decisions in Henderson and Sampson which are the two cases to see that there isn't an identity of interests, that the NFL wasn't even a party, and, therefore, it didn't have the obligation to defend these -- these positions, that the dicta in those decisions was not essential to the holding. None of the requirements for collateral estoppel apply.

The Sherwin case considered these arguments, rejected it -- rejected the arguments, and every case since then has as well.

THE COURT: Okay.

MR. BIRENBOIM: Thank you, Your Honor.

THE COURT: Thank you. Okay. Mr. Strauss.

MR. STRAUSS: Thank you, Your Honor.

Steve Strauss for the Seau family. And, Your Honor, I would ask you to indulge me for a few moments because we didn't have an opportunity to address you five years ago when you heard these arguments. You haven't had a chance to think

about the unique arguments of the Seau family, so may it please the Court, it's a fundamental legal maxim that for every wrong there is a remedy unless you are suing the NFL.

Junior Seau was one of the greatest linebackers to ever play the game. He's enshrined in the Hall of Fame. He was one of football's most passionate, charismatic and beloved players, but his final years were marred, Your Honor, by changes his children could not understand, forgetfulness, depression, irresponsibility to his family and his financial affairs and a lack of connection.

Junior's career and tragic decline ended with his suicide on May 2nd, 2012, almost six years ago, Your Honor. It has made him the face of this concussion litigation. He literally gave his life for the game. But it's not Junior's injuries I'd like to primarily address today. Junior's death devastated his four children.

Under California law, the children have a separate statutory claim for wrongful death from the loss of their father. That claim is independent and it was not waived by Junior in a Collective Bargaining Agreement or otherwise.

The NFL argues not so. They say there is no forum for the children to seek relief for the devastation caused by the NFL because Junior signed a Collective Bargaining Agreement. But the CBA is irrelevant to the children's claims. They never signed a CBA. In fact, Your Honor, the

NFL did not sign it either.

The CBA was not negotiated on the children's behalf. Its terms do not benefit the children in any way or even provide them a right to pursue a grievance. The CBAs do not purport to waive their wrongful death claims. They truly have a unique claim in this litigation. The NFL's argument would leave the children with no remedy, cloaked in total immunity for claims brought by third parties who have no connection to the CBA. Neither law nor equity would sanction such an outcome.

Argument one. Preemption is not a defense because the children cannot bring a Section 301 claim or a grievance. Courts have recognized that if a party cannot access the CBA remedies, it does not bar State Law claims because it would unjustly deprive them of a remedy. And this is because the Court does not have jurisdiction to remove such claims since the State Law cannot become a 301 claim if it cannot be grieved. And that's the Young case from the Ninth Circuit.

And because doing so would be a gross injustice. As the Scott Court said, it would be anomalous to hold that Section 301 preempts the plaintiffs' State remedies because Federal Law provides the exclusive remedy only then to discover that the plaintiff had no remedies under Federal Law.

And as the Price Court said, the Court cannot sanction such an outcome.

The Ninth Circuit in Young affirmed because the plaintiff in Scott could not grieve his claim, and, therefore, jurisdiction was lacking, like here.

It doesn't matter, Your Honor, if the State Law claim may require some interpretation of the CBA. In Price, for example, the oral contract incorporated terms of the CBA, meaning the Court was required to interpret those -- those terms, but the claim was not preempted, because doing so would deprive the plaintiffs of any remedy.

The Third Circuit, Your Honor, also prohibits preemption where it does not provide an opportunity to vindicate the plaintiffs' State Law interest, and that's the Railway Labor case, 1988, Third Circuit.

While the LMRA provides a private right of action, the NFL doesn't dispute that the Seau children have any standing to bring such a claim. The NFL points to cases where preemption applied despite the fact that State Law provided different remedies than Section 301. Avco and Caterpillar.

But these cases differentiate, Your Honor, between different remedies and an absence of relief, which is what's urged here. The Third Circuit in Railway at Note 2, binding precedent in this district, affirmed that distinction, citing Avco and Caterpillar.

And it stated, "The issue is not whether the Federal Law provides the same remedy available to the plaintiff under

State Law, but rather whether there is some vindication for the same interest."

There has to be vindication for the interest.

In the NHL Players' Concussion Litigation at Note 6 says, "No question" -- this is a quote -- "plaintiff would have a forum in which to adjudicate his claim."

301 is not and never was intended to be an immunity statute that would deprive third parties with no connection to the CBA of their independent State Law right. The NFL cites many cases where the union specifically negotiated rights on behalf of probationary or temporary employees, and in exchange limited some access to the grievance procedure usually during the probationary period.

But none of these cases, none of them, involve a union waiving the rights held by third parties on whose behalf the union did not negotiate at all. The children are not signatories to the CBA nor is the NFL. The children could not bring a grievance or a 301 claim. The NFL does not dispute this. If their claims are preempted, they will have no way to vindicate their injuries.

The NFL argues that the Seau children's status as a signatory to the CBA doesn't matter. It doesn't cite any authority where neither party is a signatory to the CBA and preemption applies. Indeed, there is no such case. And the authority it does cite involve claims against non-signatory

defendants who are being sued by signatory plaintiffs like in the Atwater case.

Stringer and Dent which have been mentioned do not establish that claims by decedents bringing their own non-derivative statutory claims can be preempted. In those cases, the decedent's claims were derivative. Dent was a loss of consortium claim. Of course, a loss of consortium claim is a derivative right of a spouse.

Stringer was a nationwide wrongful death claim, but they did not assert an independent statutory right. In contrast, Your Honor, in California, the Supreme Court has spoken, the Kincaid case, wrongful death does continue even if the decedent's claim is dismissed.

Argument two. Independent statutory claims like California's wrongful death are protected from preemption. Section 301 does not broadly preempt independent statutory rights even if those rights also deal with issues that are addressed in the CBA. The children's claims do not rely on any CBA provision; rather, the NFL's duty is a common-law and those voluntarily assumed.

As the United States Supreme Court said in Lingle, "State Law analysis might well involve attention to the same factual considerations as the contractual determination under the CBA."

But we disagree with the Court's conclusion that

such parallelism renders the State Law analysis dependent upon the contractual analysis. California wrongful death claims like the Seau children's are independent, non-derivative, statutory causes of action.

Again, the California Supreme Court has spoken on this in the Horwich case. Quote. "Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure Section 377.6" -- the wrongful death statute -- "creates a new cause of action in favor of the heirs as beneficiaries based upon their own independent pecuniary injury suffered by loss of a relative and distinct from any the deceased might have maintained had he survived."

Junior could not have waived these claims before his death or as part of the CBA, and that's the Erikson (phonetic) case which we cited to you.

Again, the Supreme Court has repeatedly emphasized that independent statutory rights provided by State Law are not subject to preemption, and that's the Livadas case which follows Allis-Chalmers which follows after Lingle.

There the Court said, "Section 301 cannot be read broadly to preempt non-negotiable rights conferred on individual employees as a matter of State Law."

And we stressed it is the legal character of the claim as independent of rights under the Collective Bargaining Agreement and not whether a grievance arising from precisely

the same facts could be pursued that decides whether the State cause of action may go forward.

The Seau children's independent wrongful death claims have no connection to the CBA. Neither -- again, neither the children or the League are signatories and the CBAs are silent regarding any duty for latent head injury or the acts alleged in the complaint by either the NFL or the NFL team. These statutory claims are independent rights that do not arise until Junior's death on May 2nd of 2012.

Moreover, Your Honor, reference to the CBA does not require preemption, again, to the U.S. Supreme Court in Livadas. Quote. "The bare fact that a Collective Bargaining Agreement will be consulted in the course of State Law litigation plainly does not require the claim to be extinguished."

The NFL has cited some limited exceptions to the general rule that 301 should not be read to preempt independent State statutory protection, but none of those address the wrongful death claims brought under California law by the Seau children.

The Rawson case which has been cited by the League does not establish that wrongful death claims like the Seau children's are preempted. There the CBA expressly described the union's duty to provide a safe workplace, and the plaintiffs specifically pled that in their complaint unlike

here.

It's my only opportunity, Your Honor. Please, a couple more minutes.

THE COURT: I know but I told you ten minutes and that's --

MR. STRAUSS: Okay.

THE COURT: -- you have to fit it into ten minutes.

MR. STRAUSS: Okay. Since Rawson, Your Honor, Livadas clarified that even if some reference will be made to a CBA, Section 301 cannot be read broadly to preempt independent State rights.

The NFL also cites to the Ruiz case, but that is limited to medical malpractice claims under a California statute. And they also mentioned ERISA but that's inapposite because that statute is far broader.

Argument three, argument last. Dismissal of the children's claims do not serve any LMRA policy. 301 is limited to two policy objectives, Your Honor, neither of which would be served by dismissing the Seau children's claims.

First, ensuring enforcement of private grievance. That's one of the first policies, one of the two. The CBA does not give the children any right to arbitrate. And as this Court knows under well-established law, AT&T, you can't force a non-signatory to enter arbitration anyway. It's a matter of contract. But they have no right to file a

grievance.

And, second, Your Honor, the other policy, ensuring the application of uniform Federal Labor Law. If any CBA interpretation is necessary, the Court can simply apply those principles like the Lingle Court said. The NFL argues that the Court can't apply Federal Law, it would be inconsistent with Allis-Chalmers.

But since Allis-Chalmers, Your Honor, the Supreme Court explicitly recognized a less drastic approach in Lingle and said, "As a general proposition a State Law claim may depend for its resolution upon both the interpretation of a Collective Bargaining Agreement and a separate State Law analysis that does not turn on the agreement. In such a case, Federal Law would govern the interpretation of the agreement but the separate State Law analysis would not thereby preempt it."

And the Third Circuit has said the same, and that's in the Voilas case.

Your Honor, if I may make two more points on Junior's claims, because we are also joined with the others here on the decedent claims, if I may.

THE COURT: No, I -- I gave you ten minutes on the --

MR. STRAUSS: Well --

THE COURT: -- I'll read whatever you have down, but

I'm going to limit --

MR. STRAUSS: One -- okay.

THE COURT: -- I'm going to limit this now.

MR. STRAUSS: One of them was in response to your question about Kline. I just wanted to respond to the Court to say --

THE COURT: Oh, that -- and that's the only thing.

MR. STRAUSS: Okay. And, you know, you'll recall, Your Honor, the reasoning in Kline, it requires a specific interpretive dispute. But since Kline, there have been two more cases in the circuit that have upheld that requirement, that it has to be a specific interpretive dispute.

The first would be Stellar, and that's Eastern District, 2015, and the next would be the Third Circuit in New Jersey Carpenters in 2014. And they also affirm that if State Law claims do not turn on interpretation of the CBA, even if the State claim addresses facts that parallel issues addressed by the CBA, the claims are not preempted.

THE COURT: All right.

MR. STRAUSS: I think that's helpful to Your Honor. We have -- we have those two cases since you last heard this, and then the NHL case. And, Your Honor, the NHL case -- you asked is it a football case. The NHL case completely mirrors this case. The pleading mirrors it. It's titled In re NHL Concussion Litigation.

And the Court there on a full record said no preemption and said if he was deciding Duerson, he would decide it differently because Duerson was not well reasoned and Duerson didn't cite to any cases or authority for the proposition that the NFL duties flow from the agreement, because they're not a party to it and they flow separately.

So I would highly suggest that the Court carefully read NHL. It's a 2016 case. It's the most on point case with this case and it's since you last heard this.

THE COURT: I have -- I did read that.

MR. STRAUSS: Thank you, Your Honor.

THE COURT: Would you respond to that, this last argument?

MR. BIRENBOIM: Yes, Your Honor. It's a completely different Collective Bargaining Agreement involving the NHL. The Collective Bargaining Agreement that is involved in this case, involving football, is the one that's been addressed by every other case which has found preemption.

THE COURT: The only problem I have, frankly, is your definition under -- under Kline. I mean, I'm not sure that Kline parallels your interpretation of which --

MR. BIRENBOIM: Well --

THE COURT: -- of what I'm to look at. I mean, I -- I'm not dismissing what you have to say, but at the same time, Kline is -- I'm bound by Kline. I'm not bound by the

subsequent cases but I am bound by Kline.

MR. BIRENBOIM: Your Honor, we're happy for you to be bound by Kline.

THE COURT: Repeat that again.

MR. BIRENBOIM: Kline does not state anything about how you construe Federal Labor Law preemption that's different from the Supreme Court cases or the other cases. It's a fact question. Kline dealt with surveillance at an -- at an employee's workplace, and there were no Collective Bargaining --

THE COURT: But it -- it made a lot of other statements.

MR. BIRENBOIM: -- there were no provisions that they could look at.

THE COURT: Okay.

MR. BIRENBOIM: There was nothing to construe. No one -- no one is suggesting that every case involving the workplace is preempted. They're not. The cases that are preempted are cases where the parties have taken the issue of workplace safety or whatever is at issue in the case and negotiated it. And in this case, workplace safety dealing with concussions and things like that has been extensively negotiated, and, therefore, the Court has to construe those provisions.

THE COURT: Okay. Okay. I hear your argument.

MR. BIRENBOIM: Your Honor, just very quickly on -- I want to address Junior's claims, I'll address the claims of the children. In fact, Junior Seau did bind his heirs in the Collective Bargaining Agreement. If you look at Section 14, it is binding on the player and all of his heirs, so the children are bound by the Collective Bargaining Agreement, number one.

Number two, the children get survival benefits from the Collective Bargaining Agreement, so it's not as if they got nothing out of this. But most fundamentally, Mr. Strauss I think misunderstands Federal Labor Law preemption. Federal Labor Law preemption says that if the Court must construe a Collective Bargaining Agreement, then all State Law claims, contract and tort, are preempted.

That by definition means that not only the plaintiff but many other people may lose remedies. That follows from the fact that the Supreme Court said that if you have a Collective Bargaining Agreement at issue, that you have to construe that the Court develops Federal common-law of labor law. If the Federal -- if the Federal Court wants to develop Federal common-law that gives remedies to different people, it may do so.

But the issue here is does the case belong in State Court or does it stay with this Court and must the claims be dismissed on preemption grounds?

And just finally, Your Honor, there are -- look at wrongful death cases in the football context or in other contexts. Rawson, Shane (phonetic), Negron, Ellison, Corner (phonetic) -- both of those last two are Ninth Circuit. There's case after case, including Stringer by the way which is a wrongful death case, there are many, many wrongful death cases brought for these kinds of injuries that are preempted.

When you look at the analysis that's been handed down by the Supreme Court and by Kline and by other cases, there is nothing in the analysis that says you have to construe a Collective Bargaining provision and there must be a remedy. It just doesn't say that. None of the cases say that.

And, in fact, Caterpillar, the Supreme Court case, said in Footnote 4, "The Court of Appeals appears to have held that a case may not be removed to Federal Court on the ground that it is completely preempted unless the Federal cause of action relied upon provides the plaintiff with a remedy."

And then the Court says, "This analysis is squarely contradicted by our decision in Avco. We there held that a 301 claim was properly removed even though at the time the relief sought by the plaintiff could be obtained only in State Court."

That's exactly this situation, and that's why -- that's why the cases cited in our brief, Young, Chimmel

(phonetic), Boatwright (phonetic), there are many, many cases where a State Court claim is extinguished by preemption. That's what preemption is all about. So we think that in this case the Seau children's claims are preempted just like -- just like Junior Seau's claims are as well.

Thank you.

THE COURT: Okay. Thank you. I think that you're on.

MR. McCLAIN: Mr. Schermerhorn is going to argue on our behalf, Your Honor.

THE COURT: Oh, okay. I don't have you on this list here. Let me --

MR. SCHERMERHORN: Judge, I can grab you a card. I'm sure I'm on our pleadings. I work for the Klamann Law Firm.

THE COURT: You better just tell me your name again. I'm sorry.

MR. SCHERMERHORN: First name is Andrew. Last name, I'll spell it for you, it's lengthy. S-C-H-E-R-M-E-R-H-O-R-N.

THE COURT: Schermerhorn, is that correct?

MR. SCHERMERHORN: Exactly.

THE COURT: Okay. All right, Mr. Schermerhorn.

MR. SCHERMERHORN: Good afternoon, Your Honor, and if it may please the Court --

THE COURT: You're arguing on behalf of the --

you're asking for remand?

MR. SCHERMERHORN: Exactly.

THE COURT: Okay.

MR. SCHERMERHORN: I'm here on behalf of various players who played for the Kansas City Chiefs and the St. Louis Cardinals, and I want to make a couple of points. I understand you've read our briefs, and I will admit, we briefed this issue a couple of times, so there's a lot of material there. So I won't belabor the point, but I do want to make some important distinctions.

First, our case is unlike all the others because we've sued our employer and we've sued for breach of the common-law duty to provide a safe workplace. And in --

THE COURT: Under Missouri law.

MR. SCHERMERHORN: Under Missouri law, exactly. And Missouri, like most states, requires that employers provide a safe workplace. Missouri, unlike most states, although as it happens, like Pennsylvania, provides employees the right to sue their employer as opposed to challenge their injury in work comp, and so that's what our players have chosen to do. They were given by the State Court of Missouri the option of pursuing either a work comp claim or pursuing a civil claim in State Court, and they've chosen to pursue a civil claim in State Court.

In all senses, Your Honor, our claims are exactly

like those that were pursued in Stellar and McNeal here in this district. In those cases, employers alleged that they suffered from occupational diseases. The Pennsylvania Supreme Court ruled that the statute allowed for occupational disease claimants to bring suit in State Court.

In those cases, they did so, and this Court decided three times, once in Stellar, twice in McNeal because the defendants asked that it be reconsidered, this Court decided in all three cases that those claims were independent of the Collective Bargaining Agreement. And that ultimately, Judge, I think is the question.

The Court, the Supreme Court and the Third Circuit, the Eighth Circuit, we cite to a bunch of cases, and they say various things, and we could trace through the development of the law. Essentially what they all say is that the Court must consider whether, in the absence of a CBA, in our particular case, was there a duty to provide a safe workplace? And so if the Court can answer that question without resorting to a CBA, then our claims are not preempted.

But I want to make another quick point here at the very start, just so you understand how our case is unique. Cases in which preemption is put forth as a defense, the Court considers the claim, the petition and potential defenses. In our case, preemption is being used in order to establish jurisdiction. And the cases are clear, that when the question

is whether the Court has jurisdiction, the Court cannot consider defenses.

So if the NFL, or in our case, the Kansas City Chiefs, the St. Louis Rams or the former Cardinals, stand up and say, well, the scope of the duty's been modified or well, we were given -- we have the right to do particular things in the agreement, or well, the agreement says this or the agreement says that, those are defenses. They might work under ordinary preemption where the Court is just construing both the claims and the defenses. But here the Court is only to consider the claims.

And, again, the question is in our particular case, could we establish for our negligence claim a duty, breach of that duty and causation all in the total absence of a CBA? And the answer is yes.

Missouri common-law provides the duty and there's no question that that duty belonged to the players. It was not waived in any CBA. And even if it had been, that would be a defense. And so as to whether the Court has jurisdiction, I think in our case the answer is -- is very easily, no.

The other thing is in our case at least with respect to the players who have sued the St. Louis Cardinals -- you asked earlier is there a case on point? Is there a case where the NFL or teams have been sued for breach of the duty to provide a safe workplace? And the answer is, yes, ours. In

our case, Judge Perry of the Eastern District of Missouri, considered the exact claim.

These exact claims were brought -- this petition, this exact case. It was called Green at the time. It's now Smith. It is -- it is one of the cases I'm here on behalf of. She decided that the claims were not preempted because they arose under Missouri's common-law and they could be decided under Missouri's common-law. There was no need to refer to a CBA.

In the total absence of a CBA, the players were owed a duty by their employer just like everyone in the State of Missouri is owed a duty by their employer to maintain a safe workplace, those bound by CBAs, those not bound by CBAs.

And one of the things she said that I thought was insightful was that in Green, two of the players were never bound by a CBA ever. They played only during the gap years. And presently I represent four players who played only during the gap years.

And so ask yourself, for those individuals, could they bring a suit against their employer, the Kansas City Chiefs or the St. Louis Cardinals, for breach of the common-law duty? The answer is yes. If the answer is yes for them, it necessarily is yes for everybody else. Because if we imagine there's no CBA, all of those players could bring claims just like those who are not bound by the CBA. So that

makes our case unique.

And I don't want to spend a lot of time, Judge, because I think we say a lot in our briefs and you've already heard a lot today. But I would like to set forth what I think is the framework. You've heard that word before, but I think this is the framework. It takes into account everything that's been said by the Supreme Court and the Third Circuit.

And it's this: When the Court has considered negligence or breach of contract claims, it's asked in the absence of a CBA, is there a duty or in the absence of a CBA, is there a contract? So the first case, I would suggest that is on point here, and I don't know how the Chiefs and the Cardinals get around it, is Hechler.

That was a case brought by an employee against a union, and she alleged that the union violated its duty to provide a safe workplace. And the Supreme Court said, that would be true if you had sued your employer but you haven't. Instead, you've sued your union, and so that duty, the one you're claiming, doesn't arise under the common-law as you suggest and so your -- the claim was preempted.

In Caterpillar, the Supreme Court was asked whether a duty existed -- I'm sorry, a contract existed, absent the CBA, it's -- consider it -- absent the CBA, was there a contract? And the Court answered yes, there was an oral agreement, and that was enough because that was a

jurisdictional case.

In Berta (phonetic), in this circuit, it was a similar situation as the Caterpillar. Employees alleged that they had an oral agreement for continued employment. Their employer, through a CBA, had provisions about their employment and ultimately they were terminated. And they sued for breach of contract. And the Third Circuit asked, absent that CBA, was there a contract? And the answer was yes, there had been an oral agreement. And so the case was not preempted.

The same is true for Trans Penn Wax. I won't get into it. And then, obviously, Stellar, McNeal, we cite to repeatedly in our brief. We think they're directly on point, but there the Court asked in Pennsylvania is there a common-law duty to provide a safe workplace? If the answer is yes, absent a -- you know, in the absence of a CBA, then the claim is not preempted.

Gore is directly on -- I mean, I'm sorry. Green is directly on point. Green is our case. So we think when the Court considers the claims of the Cardinals players, it has to not just ask itself the preemption question, the question that it's faced throughout today, it has to first ask itself should Green be overruled? The law of the case doctrine suggest not.

The law of the case doctrine obviously applies where one Judge in at a coordinate branch or at a coordinate level decides a case. A second Court, the sister Court, should not

easily override it. And the Courts have said that that doctrine applies especially where cases have been transferred from one district to another.

And even more especially in the MDL settings. So in an MDL where a Court has decided an issue once before, a second Judge shouldn't lightly overturn it unless there have -- unless there are extraordinary circumstances. And I will submit that there are not.

Before I go on, though, I started with the framework, and I want to return there very quickly. As to negligence and contract claims, again the question is in the absence of a CBA, is there a duty or a contract?

There is a separate species of cases -- I would call it Allis-Chalmers, Lingle and Livadas. In those cases, the Court considered whether claims were brought -- in those cases, claims were brought under State statutes that prescribed conduct or established particular rights.

In Allis-Chalmers it was the right to a good faith payment of a disability claim.

In those cases, the question is in the absence of a CBA, would the rule, the State rule, apply? And Allis-Chalmers is a perfect example of no, it wouldn't. Because in that case, the duty to pay a disability payment arose from the CBA. So absent the CBA, the State rule wouldn't apply.

In Lingle and Livadas, the answer was the exact

opposite. In Lingle, there was a rule prohibiting retaliatory discharge if somebody filed a work comp claim. Well, that rule applies regardless of whether there's a CBA. The CBA didn't give rise to the right not to be retaliated against. And so there the claim wasn't preempted.

In Livadas, a similar thing, the California statute requires that if you're terminated, all the pay that you have owing to you is due upon termination, that day, and the Court said, well, that's a right that's owed to every employee. It doesn't matter if they're a member of a Bargaining Unit. And so in the absence of a CBA, that right would have arisen and so the claim was not preempted.

So in this case, our claims fit under both of those. Our claims are for negligence. Does the duty arise absent the CBA? Yes, under the common-law. And also our claim is for conduct that is prescribed. Missouri prohibits that employers do things that result in unsafe workplaces. So no matter how you look at it, our cases are not preempted.

And then finally, there's a third species of cases, and I would put Kline in the third species. Kline is unique because the claim isn't for negligence, so the Court isn't asking itself is was there a duty absent the CBA. It's also not a claim in which there are particular rights that have been granted by State statute or the common-law. Instead, that is a case alleging a violation of State Law.

It's similar to a case in the Eighth Circuit called Gore. In both cases, the allegations are that an employer violated the privacy rights of an employee. And so there the question's a little more difficult. It's not so easy to say is there a duty absent the CBA or would the right have arisen absent the CBA? There the Courts in both cases do get to the question, is there a provision, a specific provision -- they both say that -- is there a specific provision in the CBA that requires interpretation?

So no -- none of the other cases fall into the same category as either Kline or Gore. But Kline and Gore follow those cases because what those cases mean, what they all stand for -- you can -- you could look at them all, and they all stand for the exact same thing, which is in the absence of a CBA, could these claims be pled?

And in our case, that's it, that's as far as you would go. Arguably under ordinary preemption, you could also ask, could they be pled and ultimately litigated without the need to interpret a CBA?

So I would suggest that's the framework where the claim is for negligence or breach of contract, the question is simply absent the CBA, would they have a claim under the common-law for breach of the duty to provide a safe workplace? And in our case, the answer is clearly yes.

I don't want to take too much time and I hope --

THE COURT: Yes.

MR. SCHERMERHORN: -- am I done?

THE COURT: Yes.

MR. SCHERMERHORN: Okay. If you'll indulge me just for a quick reply when -- after they're done, then that'll be all.

MR. BIRENBOIM: Your Honor, the Chiefs and Cardinals case should be dismissed as preempted for exactly the same reasons as all the other cases, the same Collective Bargaining provisions apply. So I won't go through that again, but I will take a minute to explain why the case is not different, which is what counsel has just said.

First of all, he started off by saying the case is different because in their case, the club has been sued as opposed to the League. That doesn't make a difference. First, that does not go to the question of do Collective Bargaining provisions need to be construed? That's the question in preemption.

And, in fact, the -- the Jeffers case, the Sherwin case, the Givens case, those are all cases against clubs where preemption was found. There's no suggestion in the preemption law that it matters whether -- whether the club is sued or whether some other party is sued.

Number two, Your Honor, counsel cited to the Stellar and McNeal cases which are -- were decided under Pennsylvania

law. The law that is applied here for purposes of determining whether these Chiefs and Cardinals had some kind of non-negotiable right under Missouri law is obviously Missouri law.

And the Gore case which counsel mentioned really answers everything about plaintiffs' argument. Plaintiffs' argument in this case is that there's some kind of non-negotiable independent right to a safe workplace under Missouri law. Gore, Eighth Circuit, controlling law on that issue, completely rejects that.

Gore says in this case the District Court concluded that Gore's State Law claims were preempted because they are inextricably intertwined. Gore asserts that his State Law claims exist independent of the Collective Bargaining Agreement and are not preempted. That's the Chiefs' and Cardinals' position.

Our view of Missouri law, however, convinces us that the rights asserted in Gore's tort claim are not non-negotiable independent State Law rights. And the rights at issue are, and I'm quoting, "to provide a safe working environment."

And, Your Honor, that makes eminent sense because virtually every state has common-law obligations of an employer to provide a safe workplace. So if you could just sue and say I'm suing under the common-law of the state to provide a safe workplace and get out of labor law preemption,

you would utterly eviscerate labor law preemption where there's a Collective Bargaining Agreement. That's plainly not the law and that's why the cases don't support that.

And with respect to the law of the case doctrine, Your Honor, first to be clear, the Green case only applies to the Cardinals, and there are only two Cardinal plaintiffs. So we're only talking about two -- just to be clear, we're only talking about two plaintiffs here.

THE COURT: Do you agree with that?

MR. SCHERMERHORN: Yes, yes.

MR. BIRENBOIM: So put that aside for a second. Let's also be clear about which kind of law of the case we're talking about. There's law of the case that says that where a decision is made and it goes up on appeal and is affirmed, the District Court Judge must follow that decision. That's the law of the case. That's mandatory. That's not what we're talking about here.

The other kind of law of the case is discretionary, completely discretionary on the part of the Judge to follow a prior --

THE COURT: I apply Third Circuit law to that, don't I? I apply Third Circuit law to that.

MR. BIRENBOIM: Correct. And I'm quoting Third Circuit law. Roberts vs. Ferman. We'll lay that out and describe that.

And in this case, the fact is that the Green case was wrongly decided because it completely ignored Gore which is controlling Eighth Circuit law. The Judge simply did not apply Gore for the proposition that workplace safety issues are in fact negotiable, and the Judge made a second mistake.

She said if there is a player who is in a gap year, and she decides that the Bargaining Agreement does not apply to that player, then it follows that for the other player who is covered by the CBA, that player must have an independent claim. That actually doesn't follow logically.

What really follows is that if you accept one, maybe that player -- there's no preemption for that player possibly. But when the Collective Bargaining Agreement does come into play, then Federal Labor Law preemption comes into play. So the Judge got it wrong on both those counts. We think it was clearly erroneously decided. It's clearly inconsistent with all the other cases in this area, so we think Your Honor is not at all bound by the Green case.

THE COURT: All right. Thank you.

MR. BIRENBOIM: Thank you, Your Honor.

THE COURT: Do you want a short rebuttal?

MR. SCHERMERHORN: Please. It's -- it's just simply not true that Judge Perry didn't consider Gore. She did consider Gore. She talks about Gore in the opinion. And it's important that the Court understand what Gore is about.

There, like I said, an employee sued their employer for violating their privacy rights. They had come to work -- they worked for TWA -- and they made threats to other employees, suggesting that they were going to both kill -- this individual was going to kill his co-workers and then shoot himself. And TWA retained him, they searched his locker, they searched his car. They reported that he was a threat to other employees.

It ultimately, after an investigation, was decided that he was not a threat, but he brought a claim against his employer for breach of his privacy rights and for wrongful detention. And Gore said -- Gore is an Eighth Circuit decision. It didn't overturn any law, it didn't announce any new law.

All it said was, of course, an employer through a CBA can negotiate what it can do. And in this case, the employer negotiated the right to search lockers. The CBA said the employer had the right to search lockers. It had the right to detain him if he was a threat.

So we don't -- we don't challenge the -- I agree that it is a preceptive labor law that -- through a CBA, the rights and obligations of employees and their employer are negotiated. I understand that that's what CBAs are. And so that's all Green says, is that the rights of the employer were negotiated in that case. And Judge Perry understood that when

she decided Gore.

What she decided, though, was the right to maintain a safe workplace, he wasn't alleging that. He himself was a threat to a safe workplace. The right to maintain a safe workplace is not negotiable. That is the law of the State of Missouri, and we set that forth very clearly in our -- in our reply brief.

It's unfortunate that there isn't a lot of law on that issue, and that's because, much like throughout the rest of the country, once work comp statutes were passed, the development, the annunciation of the law as it applies to the duty that an employer owes to an employee basically stopped. So we cite to older cases, but they're no less precedential, and they're -- and they state the law in the State of Missouri, not Gore.

And I would say one other thing about Gore. After it was decided, the Eighth Circuit considered it and considered a separate line of cases in which they have all -- had all held claims not preempted. And they said in that case, it was called Schnooks (phonetic) -- I can provide the cite. I think we cite to it in our briefs.

But the case said, Gore -- we're choosing to go down the path that is more narrow. And they cite to Gore as an example of a case in which they had not done that. So the precedential value of Gore I think is -- is diminished in the

Eighth Circuit.

The last thing I would say, he mentioned that the analysis should be the same, that our claims are no different than all the others. We've sued the teams; they've sued the NFL. The analysis, obviously, cannot be the same, because the question, like I mentioned before, is is there a duty? In our case, the answer is obvious and it's easy. I will admit that with respect to the other players it may be a little more difficult, so it cannot be the same.

And then he says that the CBAs assign -- assign obligations to the teams. Sometimes they claim that there may be an obligation owed by a committee. What they have not done, Judge, even now after five years, is point to a single specific provision that applies to this case, that applies to latent occupational disease. They have -- there's no provision that applies.

And the fact that the NFL assigns to the club some specific duty, that's irrelevant to our case. We've sued their employer. They owed those duties, whether it's repeated in a CBA or not, and so we don't need to rely on a CBA for anything.

And I will submit this: If we -- if we are remanded to State Court and we change our mind and it turns out we start citing to the CBA, well, they can remove us. We'll come right back up here, but that's -- that won't happen.

THE COURT: Okay. Thank you.

MR. SCHERMERHORN: Thank you, Judge.

THE COURT: Okay. Thank you very much.

I think that that concludes oral argument, and I think that I'm going to -- in the order that I did before -- I will speak to you about when I want you to come back to talk to me. So first let's start with Mr. Strauss. Okay, you want -- I need both sides. Bruce, are you going to come in, too? Are you going to come in?

(Proceedings concluded at 3:20 p.m.)

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C E R T I F I C A T I O N

I, Lois A. Vitarelli, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Lois Vitarelli Digitally signed by Lois Vitarelli DN: cn=Lois Vitarelli, o, ou, email=dianadoman@comcast.net, c=US Date: 2018.04.20 13:10:30 -04'00'

April 20, 2018

LOIS A. VITARELLI

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